SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 877

NATHANIEL PRESLEY DAVIS

Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Nathaniel Presley Davis, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on November 23, 1966, in this proceeding.

CITATION TO OPINION BELOW

The original opinion of the Court of Appeals, dated November 23, 1966, has not been reported to date. The majority opinion appears in the Appendix hereto at page 1A. The minority opinion appears in the Appendix at page 11A.

JURISDICTION

The judgment of the Court of Appeals is dated November 23, 1966, and was entered on the same date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Is the Government barred by collateral estoppel from using the identical witnesses and substantially the same testimony used in a former trial in which the defendant was acquitted to convict the defendant in this action when the same issues were involved in both trials?

2. Is the doctrine of collateral estoppel limited in its application to seriatim prosecution?

STATEMENT OF CASE

Jurisdiction of the District Court of the Eastern District of North Carolina was invoked because petitioner was charged with violations of the Federal Internal Revenue Act.

The petitioner, Nathaniel Presley Davis, along with five other persons, was charged in a five count bill of indictment. All counts alleged offenses on September 1, 1964, and all of the defendants were charged in each and every count of the bill of indictment. R. P. 8

The first count of the bill of indictment charged the petitioner and his co-defendants with possession, custody and control of a still and distilling apparatus for the production of distilled spirits set up without having the same registered as required by law in violation of Title 26 USC Section 5179.

The second count of the bill of indictment charged the petitioner and his co-defendants with having worked at a distillery for the production of distilled spirits, on which no sign was placed and kept in the manner and form required by law in violation of Title 26 USC Section 5180.

The third count of the bill of indictment charged the petitioner and his co-defendants with having made and fermented and caused to be made and fermented mash, wart, or wash, fit for distillation and for the production of

distilled spirits on the premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits in violation of Title 26 USC Section 5601(a)(7).

The fourth count of the bill of indictment charged that the petitioner and his co-defendants did unlawfully possess property intended for use in violation of the provisions of Chapter 51 of Title 26 United States Code of Regulations issued pursuant thereto in violation of Title 26 USC Section 5686(a).

The fifth count of the bill of indictment charged the petitioner and his co-defendants with having removed, deposited and concealed and were concerned in removing, depositing and concealing non-taxpaid whiskey in respect whereof a tax is imposed with intent to evade and defeat the assessment or collection of said tax by the United States of America in violation of Title 26 USC Section 7206(4).

The petitioner was arraigned on October 27, 1964, and entered a plea of not guilty to each and every count of the bill of indictment and requested a jury trial. R. p. 17.

The petitioner was tried in the United States District Court for the Eastern District of North Carolina in Raleigh, N. C., at a term of court commencing March 2, 1964, and on March 5, 1964, the jury returned a verdict of not guilty as to counts one, three, four, and five, but was unable to agree on a verdict as to count two. R. p. 17.

At the first trial the judge charged the jury that the petitioner Davis had presented an alibi that he was not present and if upon consideration of all the evidence the jury should have a reasonable doubt that the petitioner Davis was present at the time and place the alleged offenses were committed, the jury should acquit the petitioner Davis. Tr. p. 127, 128, first trial.

At the first trial the court charged the jury that under the statutory presumptions of 26 USC Section 5601(b)(1) and (3), they could find the petitioner guilty of counts one and three, if they found that he was present at the still. Tr. pp. 128-132; 134-135 first trial.

A mistrial was declared as to this petitioner as to count two of the bill of indictment. R. p. 17. The other defendants were disposed of by conviction or guilty plea at that term of court except the defendant Goss who appealed his conviction on the second and fifth counts and sentence to the Fourth Circuit Court of Appeals where his conviction was affirmed.

On June 14, 1965, the petitioner filed and entered a motion and plea in bar. R. p. 13.

On June 15, 1965, the Honorable John D. Larkins, Jr., denied the petitioner's motion and plea in bar. R. p. 20A.

On March 2, 1966, the petitioner was again tried in the United States District Court for the Eastern District of North Carolina on the second count of the bill of indictment. At the second trial the government placed the identical witnesses used in the first trial on the stand and their testimony was substantially the same as that given by the same witnesses in the first trial. R. p. 17, Appendix p. 11A note 1.

It was stipulated before any of the government's evidence was offered that all of the government's questions and all of the government's witnesses' answers were deemed objected to upon the grounds of collateral estoppel. Tr. p. 2 second trial.

At the close of the government's evidence and at the close of all of the evidence the petitioner Nathaniel Presley Davis moved (1) for dismissal of the action upon the grounds of collateral estoppel (2) that all the government's evidence be stricken as incompetent because of collateral estoppel and the motions were overruled. Tr. p. 82 second trial.

The jury returned a verdict of guilty as charged in the second count of the bill of indictment and the Judge on March 2, 1966, rendered judgment against petitioner Nathaniel Presley Davis committing him to the custody of Attorney General or his authorized representative for imprisonment for one year pursuant to the provisions of Title 18 USC Section 3651, petitioner to be committed to a jail-type or treatment institution for a period of six months and pay a fine of $500 and it was further adjudged that execution of the remainder of the prison sentence be suspended and the petitioner placed on probation for a period of three years under general conditions as recorded in the Clerk's office and a special condition that he pay the fine imposed under the supervision of the probation department, probation period to begin at the expiration of the active prison sentence. R. p. 17.

On March 2, 1966, the petitioner Nathaniel Presley Davis duly entered a notice of appeal from the aforesaid judgment entered against him and the sentence imposed to the Circuit Court of Appeals for the Fourth Circuit. R. p. 18.

The majority of the Fourth Circuit Court of Appeals affirmed the judgment of this district court, Appendix p. 1A. Judge Bell in a well reasoned opinion dissented, Appendix p. 11A.

Relevant Facts

WITNESS JOHN J. KEARINS, FIRST TRIAL

At the first trial witness John J. Kearins, testified that on September 1, 1964, he and other officers were observing a distillery in Youngsville Township, Franklin County, North Carolina about 50 yards distance through a 20 power telescope located in the woods and that distillery was in operation. Tr. pp. 3, 4.

Witness Kearins further stated that he saw the co-defendant Aubrey Goss at 5:15 p.m. through the telescope. Tr. p. 10, and about 5:20 p.m. he saw the petitioner Nathaniel Presley Davis bent over a row of fermenter barrels. Tr. p. 11. That he had known the petitioner Nathaniel Presley Davis for about ten years. Tr. p. 11. That the distillery was raided at about 5:45 p.m. and that Aubrey Goss, "June" Cates, John Robert Blalock, Lonnie Warren Harrison, and Charles Leonard Johnson were arrested at the distillery and that one man escaped. Tr. pp. 12, 13.

WITNESS JOHN J. KEARINS, SECOND TRIAL

At the second trial the witness Kearins testified that on September 1, 1964, he saw the petitioner Nathaniel Presley Davis whom he had known for more than 10 years at an unregistered distillery in Youngsville Township. The distillery was located in the woods in Franklin County and that he was observing from approximately 50 yards distance with a 20-power telescope and shortly after 5:15 p.m. he saw Davis and another man bending over a row of barrels in the distillery yards. Tr. pp. 3-4.

That petitioner Davis was not arrested until September 8, when he was arrested at the Alcohol and Tobacco Office in Raleigh. Tr. p. 6. That the warrant for Davis was not taken out until September 3, 1964, which was two days after the still raid. Tr. pp. 7, 8.

That he had testified at the first trial and at the commissioners hearing that he was not positive that the person he saw was the petitioner Davis until he walked into the office of the A.T.T.D. on September 8, 1964, Tr. pp. 8, 9, 10, and that statement was still true.

WITNESS LEON S. SMITH, FIRST TRIAL

The witness Leon S. Smith testified at the first trial that on September 1, 1964, he was watching the distillery through a telescope back about 50 yards from the still and at 5:15 p.m. he saw the defendant Goss, the petitioner Davis, the defendant Johnson and the defendant Cates walk into the distillery yard from the work way. Tr. p. 23. That at approximately 5:35 p.m. petitioner Davis and defendant Johnson went to the west side of the still yard to themselves, squatted down and were talking. Tr. p. 24. Leon S. Smith testified at the first trial that he saw Davis and Johnson pour some meal into some empty barrels. Tr. p. 24. The petitioner Davis went in a westerly direction from the still. He was the man that got away. Tr. p. 25.

The record of the first trial shows that the witness Smith testified that Cates and Johnson were pouring meal into the empty barrels however the cross-examination at the second trial divulges that this was a stenographic error and that the witness Smith testified at the first trial that Davis and defendant Johnson were pouring meal into the empty barrel. Tr. p. 24 first trial, Tr. pp. 31-37 second trial.

WITNESS LEON S. SMITH, SECOND TRIAL

The witness Leon S. Smith, testified at the second trial that on September 1, 1964, at approximately 5:15 p.m., he saw the petitioner Davis in a wooded area and at an unregistered distillery in Youngsville Township in Franklin County. That he was looking through a telescope mounted on a tripod approximately 50 paces from the still. Tr. p. 27.

That he saw the petitioner Nathaniel Presley Davis come into the still yard from the work way with other subjects. And at approximately a little after 5:20 p.m. on the same date he saw Nathaniel Presley Davis, through the aid of the telescope, take a foot-tub full of liquor and pour liquor into the liquor barrel which was under the shelter. Approximately 5 or 10 minutes later he also saw the defendant Davis and another subject over at the fermenter barrels pouring malt into the barrels. Tr. pp. 27, 28. That he saw the petitioner and another subject squatted down and talking just east of the fermenter barrels. That the petitioner was not apprehended. That after the raid they found non-taxpaid whiskey in the barrels. Tr. pp. 28, 29, 30.

WITNESS D. C. LAWSON, FIRST TRIAL

D. C. Lawson testified at the first trial that he was a member of the raiding party and that he observed a man flee to the west part of the distillery without a shirt. That he gave chase to this man and that he escaped. Tr. p. 69.

At the first trial, D. C. Lawson in his testimony enumerated all of the items found at the still and the items enumerated are almost identical with the fourth count of the bill of indictment and included 586 gallons of non-taxpaid whiskey described in the fifth count of the bill of indictment and 4,500 gallons of fermented mash described in the third count of the bill of indictment. Tr. p. 68. He further testified that he knew the petitioner Nathaniel Presley Davis prior to the date of the still raid. Tr. p. 83.

WITNESS D. C. LAWSON AT SECOND TRIAL

D. C. Lawson testified that at the second trial that he did not know the petitioner Davis at the time of the raid. Tr. pp. 76, 77. On cross-examination, D. C. Lawson admitted that the person who got away did not have a shirt on but tried to qualify his earlier statement that he had

given chase and directly contradicted the officer Zetts who had testified at the first trial that Cates did not have a shirt on. Tr. pp. 76, 77.

WITNESS MICHAEL D. ZETTS AT FIRST TRIAL

Michael D. Zetts testified at the first trial that June Cates who was in the process of chopping wood with a single bitted ax and had no shirt on at the time of the raid. Tr. p. 86.

WITNESS MICHAEL D. ZETTS AT SECOND TRIAL

Michael D. Zetts testified on cross examination at the second trial that he saw June Cates in the act of chopping some wood with a single bitted ax and that he had no shirt on. Tr. pp. 79-80.

WITNESS C. V. FAVRE AT FIRST TRIAL

C. V. Favre testified at the first trial that at approximately 5:15 p.m. he looked through the telescope in the general area there beneath the shelter and saw the petitioner Davis bending over looking in the liquor barrel. Tr. p. 99.

WITNESS C. V. FAVRE AT THE SECOND TRIAL

At the second trial, C. V. Favre testified that at 5:17 p.m. he saw the petitioner Davis at the distillery bending over the liquor catch tub under the shelter at the distillery and at that time he was looking through the telescope which was approximately 50 yards south of the distillery. It was a 60 millimeter 20 power telescope. Tr. p. 64.

REASONS FOR GRANTING WRIT

The majority of the Circuit Court of Appeals is in conflict with the decision of another court of appeals on the same matter and has decided a federal question in a way in conflict with an applicable decision of this court.

(1) The Government is barred by collateral estoppel from using the identical witnesses and substantially the same testimony used in a former trial in which the defendant was acquitted to convict the defendant in this action when the same issues were involved in both trials.

The point involved in this petition is not only important to the petitioner but to all of the citizens of our nation.

If the Government can take advantage of the prolific offenses that now exist in almost every criminal transaction and continue to prosecute a defendant in successive trials with the identical witnesses involving the same issue and substantially the same evidence until the defendant is either broken in health and finances or is convicted or is broken in health and finances and convicted, the double jeopardy clause of the Fifth Amendment to our Constitution will have been violated in spirit, if not literally violated, and one of our greatest heritages will have been by-passed.

The petitioner respectfully submits that the doctrine of collateral estoppel has arisen in our Jurisprudence to prevent the double jeopardy clause of the Fifth Amendment to our Constitution from being violated in spirit even though not violated in fact and that the decision of the majority of the Fourth Circuit Court of Appeals practically destroys the safeguard of the doctrine of equitable estoppel established by this Court in *Sealfon v. U. S.* 332 U.S. 574 and by the Second Circuit Court of Appeals in *United States v. Kramer,* 289 F.2d 909.

The decision of the majority of the Circuit Court of Appeals is in conflict with *U. S. v. Kramer,* 289 F.2d 909, which was a Second Circuit Court of Appeals case in which the defendant Kramer at a previous trial in the District Court of Connecticut was acquitted on counts charging burglaries in the Orange and Wilton, Connecticut, Post Offices respectively. At a later date the defendant was tried and

convicted on four counts of a bill of indictment, the first count charging conspiracy to enter the Wilton, Connecticut, Post Offices, the second count was similar to the first count except that it related to the Orange, Connecticut, Post Office. Count three charged a conspiracy to receive, conceal and retain with intent to convert to his own use money, vouchers, and things of value of the Post Office Department knowing the same to have been stolen. Count four charged the substantive count related to count three. The Government was permitted to offer testimony substantially identical to that given in the Connecticut trial, over the seasonable objections of the defendant.

The second Circuit Court of Appeals held in *U. S. v. Kramer,* supra, that the verdict in the prior prosecution barred the prosecution on counts one and two of the bill of indictment on the grounds of collateral estoppel and at page 916 stated:

> "The very nub of collateral estoppel is to extend res judicata beyond those cases where the prior judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment, . . . to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; BUT IT MAY NOT PROVE THE NEW CHARGE BY ASSERTING FACTS NECESSARILY DETERMINED AGAINST IT ON THE FIRST TRIAL, NO MATTER HOW UNREASONABLE THE GOVERNMENT MAY CONSIDER THAT DETERMINATION TO BE."

In *United States v. Kramer,* supra, at page 915, the Second Circuit further said:

> "Considering the matter in a practical frame and viewed with an eye to all the circumstances of the proceedings, as the Supreme Court has directed, Sealfon v. United States, supra, 332 U.S., at page 579, 68 S. Ct. at page

240, it would seem rather plain that the admission of evidence showing Kramer's offenses charged in the first indictment violated the rule, also stated in Sealfon, 332 U.S. at page 578, 68 S. Ct. at page 239, that the Connecticut verdict 'OPERATES TO CONCLUDE THOSE MATTERS IN ISSUE WHICH THE VERDICT DETERMINED THOUGH THE OFFENSES BE DIFFERENT'."

The Second Circuit Court of Appeals in *U. S. v. Kramer,* supra, at page 916, also stated:

"More important, to permit the government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the government from the extensive catalog of crimes furnished it in the criminal code would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the fifth amendment . . . and still longer before the proliferation of statutory offenses deprived it of so much of its effect."

The Second Circuit in *U. S. v. Kramer,* supra, at page 914, further stated:

"The Government proved the fact of the burglaries and the extent of the damages and theft in thoroughness and detail. THE ISSUE FOR THE JURY WAS NOT WHETHER JOBS HAD BEEN DONE BUT BY WHOM."

Charges in count three and four of the bill of indictment in *U. S. v. Kramer,* supra, were not dependent upon Kramer being a participant in the burglaries and therefore the Second Circuit Court of Appeals did not order a judgment of acquittal as to Kramer on those two counts.

In the case of *Sealfon v. U. S.,* 332, U.S. 575, Sealfon was prosecuted for conspiring with Greenberg and found

not guilty. He was then prosecuted on the substantive count and convicted. This court reversed the conviction because "the core of the prosecutor's case in each case was the same." The conviction on the second trial was reversed even though there was additional evidence that improved the case. This court stated that in both trials it was essential to prove that Sealfon wrote a letter to Greenberg pursuant to an agreement and that the second trial was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was at the first trial adjudicated to be nonexisting and that this could not be done by the prosecution.

It is respectfully submitted that in both the first and second trials of the petitioner his guilt or innocence depended upon the identity of him as the person seen at the distillery pouring meal or malt into the empty barrel and who escaped and was not apprehended on the afternoon of the raid. The overwhelming importance of the issue of the petitioner's identity is shown by the charge the court in the first trial in which the trial judge charged the jury that the defendant Davis had presented an alibi that he was not present and if upon consideration of all the evidence the jury should have a reasonable doubt that the defendant Davis was present at the time and place that the alleged offenses were committed, the jury should acquit the defendant Davis. Tr. pp. 127, 128 first trial. Also at the first trial the court charged the jury that under the statutory presumptions of 26 USC Section 5601(b)(1) and (3) they could find the defendant guilty of counts one and three if they found that he was present at the still. Tr. pp. 128-132; 134-135 first trial.

Judge Bell in his excellent dissenting opinion clearly sets forth how the majority opinion of the Circuit Court disregarded *Sealfon v. U. S.* supra, and *U. S. v. Kramer,* and instead of ascertaining the "nub" or "core" of the case went into meticulous analysis of the separate elements of the

several crimes involved in making illicit whiskey. Judge Bell Appendix pp. 12A, 13A stated:

> "Notwithstanding the majority's meticulous analysis of the separate elements of the several crimes involved in making illicit whiskey, the one real issue before the jury was clearly and simply a question of identification. While it is true that the testimony of the five government agents regarding what they observed at the still varied in minor particulars from the first to the second trial, the government's entire case against Davis in both trials consisted of the agents' observations through a telescope on a single occasion. The majority opinion asserts that the jury reasonably may have been convinced of the agents' identifications of Davis since the four counts of which he was acquitted required a finding of something more than mere presence. The majority opinion fails to point out that presence alone was enough to convict the defendant on two of the four counts of which he was acquitted, and the district court carefully instructed the jury to that effect. Although there is a remote possibility, of course, that the jury may have believed that Davis was present but not guilty of any of the four counts of which they acquitted him, it is highly improbable in view of the instruction as to the statutory presumptions created by presence. It is almost always possible in a criminal case to hypothesize alternative cases for a jury verdict, and to do so in the meticulous manner of the majority opinion rather than to look at the evidence as a whole is to vitiate, to a great degree, the doctrine of collateral estoppel as applied to criminal cases."

Judge Bell in his well reasoned dissenting opinion further pointed out that the test to be applied in determining what issue has been previously found for the defendant is the test used by the second Circuit in *U. S. v. Kramer,* supra, and by this court in *Sealfon v. United States,* supra, that

"The core of the prosecutor's case was in each case the same." Appendix pp. 14A, 15A.

The dissenting opinion of Judge Bell also pointed out that the majority has mistakenly applied the civil rule test for applying collateral estoppel. The civil rule test requires extreme caution in making a determination of collateral estoppel. In a criminal case the liberty of the defendant is at stake, not merely his rights and liabilities. In a criminal case the predominating policy for applying collateral estoppel is the policy of the double jeopardy clause of the Fifth Amendment — to prevent harassment of the defendant and his being subjected to a second trial. Appendix p. 14A.

Applying the principles of Second Circuit in *U. S. v. Kramer* and of this court in *Sealfon v. U. S.*, Judge Bell in his dissenting opinion Appendix pp. 14A, 15A well stated:

> "It seems to me beyond quibble that the 'core' of the Government's case in both trials of Davis was the question of whether Davis was present at the still and that the jury in acquitting Davis on four of the five counts in the first trial decided that issue in the defendant's favor. That trial was a full and fair hearing and a definitive adjudication of the matter. . . . "

The witnesses for the government in both trials were identical and so substantially the same in their evidence that the Government conceded in its brief on appeal in the Circuit Court that the testimony of the witnesses was substantially the same. Appendix p. 11A. Note 1 and the fact that the witnesses testimony was substantially the same was for the purpose of appeal was conceded by the majority opinion. Appendix p. 5A.

The majority opinion of the Fourth Circuit Court of Appeals on this point is not only erroneous but is in conflict with the decision of the court of appeals of the second circuit on the same matter and the majority opinion has decided a

federal question in a way in conflict with an applicable decision of this court and in order to settle the conflict between the Second Circuit Court of Appeals and the Fourth Circuit Court of Appeals and to correct the decision of the majority of the court in this cause on a federal question in a way which conflicts with an applicable decision of this court, a review of the decision below is a requisite.

(2) The doctrine of collateral estoppel is not limited in its application to seriatim prosecution.

The majority opinion Appendix pp. 9A, 10A suggests that the doctrine of collateral estoppel applies only to seriatim prosecution and does not apply where all of the offenses are contained in the same bill of indictment, and states that unless seriatim prosecution is involved in collateral estoppel it is "certainly less compelling."

The majority opinion on this point is in direct conflict with the Ninth Circuit Court of Appeals in *Cosgrove v. U. S.*, 224 F.2d 146, wherein the appellants were tried on a bill of indictment which contained numerous counts and the trial resulted in acquittals on counts one and two and mistrials as to the remaining counts. At the second trial the defendant Cosgrove was convicted on counts against him which had resulted in a mistrial in the former case and his co-defendant Doyle was also convicted on counts which had also resulted in a mistrial in the former trial. The Ninth Circuit Court of Appeals on the grounds of collateral estoppel reversed both decisions and relied heavily upon the authority of *Sealfon v. U. S.*, supra.

The petitioner respectfully submits that the suggestion of the majority of the circuit court that the doctrine of collateral estoppel applies only to seriatim prosecution and its holding that the doctrine of collateral estoppel is "certainly less compelling where all of the offenses were initially joined in the bill of indictment," not only is in conflict with the ninth

circuit in *Cosgrove v. U. S.*, supra, but is in conflict with the holding of the second circuit in *U. S. v. Kramer*, supra, and the decision of this court in *Sealfon v. U. S.*, supra, where it was established that if the "core" of the prosecutions' case was the same in both trials the government is barred by collateral estoppel from prosecution of the second trial.

The "core" test is equitable in its nature and does not include technical considerations.

The majority decision of the circuit court of appeals of the Fourth Circuit on this point is not only erroneous but is in conflict with the decisions of the Second and Ninth Circuits on the same matter and has decided a federal question in a way in conflict with the applicable decision of this court. And a review of the decision below is a requisite.

CONCLUSION

For the foregoing reasons a writ of certiorari to review the judgment of the majority of the court of appeals for the Fourth Circuit should issue.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,580.

United States of America,
Appellee,

versus

Nathaniel Presley Davis,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH.
JOHN D. LARKINS, JR., DISTRICT JUDGE

(Argued October 7, 1966. Decided November 23, 1966.)

Before BELL, WINTER and CRAVEN, Circuit Judges.

Irvin B. Tucker, Jr., for Appellant; and Larry G. Ford, Assistant United States Attorney, (Robert H. Cowen, United States Attorney, on brief) for Appellee.

CRAVEN, Circuit Judge:

This is another minor episode in the continuing national effort to destroy the white (non-taxpaid) liquor business and prevent the manufacture of the sometimes dangerously toxic beverage. A general statute of prohibition might have sufficed to make the traffic in all of its aspects illegal, but the Congress has seen fit to break it down into its many component parts. The multiple offenses are defined with great specificity. Thus it is that one who spends a morning in an illicit distillery engaged in its business may find that he has committed not one, but as many as five or more separate offenses against the laws of the United States.

As to appellant Davis, the prosecutor chose to arm himself with five counts in a single bill of indictment — perhaps for the same reason that a man hunting birds will load his automatic shotgun with as many shells as the law allows. Such multiple prosecution is clearly lawful,[1] and Davis does not contend otherwise. *Bozza v. United States,* 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818 (1947).

At the first trial, the jury acquitted Davis on four out of five counts and was unable to agree on the other one — resulting in a mistrial as to that count. Upon retrial on the unresolved single count, the defendant pleaded double (former) jeopardy and res judicata (collateral estoppel). He urgently insisted that his prior acquittal on four counts effectively barred further prosecution on the remaining count. The district judge rejected his contention, submitted the matter to the second jury, and the jury convicted Davis, from which conviction he has now appealed to this court.

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1 It has been suggested that the fragmentation of a single course of conduct into a multiplicity of offenses derives from legislative concern for the protection of defendants, i.e., enabling them to know with specificity the proscribed activity, rather than any wish to aid prosecution. Mayers and Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 29 (1960).

It is established beyond question that, absent unfair conduct on the part of the prosecuting attorney or the court, mistrial of a criminal case does not prevent subsequent retrial and conviction. That the Double Jeopardy Clause of the Fifth Amendment might have been more broadly interpreted to bar reprosecution after mistrial avails the defendant nothing, for it has not been. *Eg., Gori v. United States,* 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed. 2d 901 (1961); *Thompson v. United States,* 155 U.S. 271, 15 S.Ct. 73, 39 L.Ed. 146 (1894); *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824).

Unaided by the constitutional doctrine of double jeopardy, Davis insists that his second prosecution is barred by the judge-made doctrine of res judicata or collateral estoppel. The district court thought otherwise, and we agree.

In general, the doctrine of collateral estoppel "operates to conclude those matters in issue which the verdict determined though the offenses be different." *Sealfon v. United States,* 332 U.S. 575, 578, 68 S.Ct. 237, *239,* 92 L.Ed. 180, 184 (1948). The principal difficulty in application of the definition is in ascertaining what has been "determined" at the first trial.

The extreme view of what has been "determined" has been stated as follows: that all matters alleged in an indictment or asserted by way of defense which *might* have been employed by the jury in returning a verdict for the defendant are to be considered determined in his favor. No federal court has gone so far in shielding accused persons. Mayers and Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 34 (1960).

We see nothing to commend the adoption of such an extreme rule — especially in a situation such as this one where multiple offenses have been joined in one prosecution and there has not been seriatim harassment.

The usual rule, seldom articulated but generally applied by most courts, derives its strength from the "same evidence" test generally favored in double jeopardy cases and the general rule in civil cases. It is that the party seeking to foreclose reconsideration of an issue must show that it logically *must* have constituted the basis of the verdict. Restatement Judgments § 68, comment K (1942); James, Civil Procedure § 11.20 (1965). Only those issues necessarily determined by the first jury are conclusive in the second trial.

Inevitably, in the application of such a rule to effectively bar subsequent prosecution, the courts have indulged in a presumption of rational determination by the first jury. This is not done because judges believe that jury verdicts are always rational,[2] but because to do otherwise would destroy the doctrine of collateral estoppel before it is born. This we are not free to do. *Hoag v. New Jersey,* 356 U.S. 464, 78 S.Ct. 829, 2 L.Ed. 2d 913 (1958); *Yates v. United States,* 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed. 2d 1356 (1957); *Sealfon v. United States,* 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948); *United States v. Oppenheimer,* 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916).

It is now necessary to examine the elements of each of the offenses enumerated in the five counts of the bill of indictment and the record of the trial to see what was "determined" by the first general verdicts of acquittal.

The bill of indictment was a five count bill charging Davis and four other persons with the violation of five separate sections of Title 26 of the United States Code.

The first count charged them with having "in their possession and custody and under their control" a still and

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[2] In *Hoag v. New Jersey,* it was said that "jury verdicts are sometimes inconsistent or irrational." 284 U.S. 464, 472, 78 S.Ct. 829, 835, 2 L.Ed.2d 913, 920 (1958). See also discussion by Mr. Justice Holmes in *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932).

distilling apparatus for the production of distilled spirits set up without having the same registered as required by law in violation of Section 5179.

The second count, as to which there occurred a mistrial, charged simply that each of the five named persons worked at a distillery which was not posted with a sign as required by law in violation of Section 5180.

The third count charged the same persons with having made and fermented, and caused to be made and fermented, mash wort or wash, fit for distillation and for the production of distilled spirits at an illicit distillery in violation of Section 5601(a)(7).

The fourth count charged them with unlawfully possessing various devices and items of property, described in detail, intended for use in violating the liquor laws in violation of Section 5686(a).

The fifth count charged that they removed, deposited, and concealed, and were concerned in removing, depositing, and concealing, 586 gallons of non-taxpaid whiskey with intent to evade taxation on said whiskey in violation of Section 7206(4).

The same witnesses who testified in respect to Davis at the original trial appeared when he was retried on the second count. Although the testimony varied in important respects,[3] we will assume for purposes of this appeal, as urged by appellant, that the evidence in respect to him at the first trial was substantially identical with that at the second.

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[3] There was no testimony at the first trial that Davis was seen pouring a foot tub of whiskey into a liquor barrel. At the second trial, key government witness Smith testified he saw Davis "take a foot tub full of whiskey and pour it into the liquor barrel, which was under the shelter." Record, Transcript from Second Trial, p. 28. On cross-examination, counsel for Davis asked Smith why he had not stated at the first trial that he saw Davis pouring the whiskey into the liquor barrel. Smith answered that "it was an oversight on my part that I did not testify to that." Record, Transcript from Second Trial, p. 32.

Briefly stated, the evidence, on the foregoing assumption, tended to show that federal and state officers spied upon the distillery with the aid of a telescope and saw Davis engaged in the following activities: bending over and looking into a row of barrels containing whiskey, pouring meal or malt into the fermenter barrels, and pouring a foot tub full of whiskey into a liquor barrel.[4]

What do the general verdicts of acquittal entered on counts one, three, four, and five "determine"? Indulging, as we must, in the so-called presumption of rationality, without which Davis cannot prevail, we put to one side the distinct possibility that neither ultimate nor evidentiary facts were established by the verdicts.[5] The required premise is that something rational *must* be said to have been established by the general verdicts of acquittal.

Davis urges that acquittal on count one means simply that the jury was not satisfied of his identity and failed to find that he was present at the distillery. This is a perfectly rational and logical interpretation of the general verdict. But, it is equally rational and logical to conclude that the jury was satisfied Davis was present at the distillery but was dissatisfied that he had possession and custody and control of the still. As stated in *Bozza,* a case involving the identical fact situation:

> "It might be possible that petitioner's helping to make the alcohol aided and abetted in its 'custody or possession'. But that would be a very strained inference under any circumstances . . . Yet there was no testimony that the petitioner ever exercised, or aided the exercise

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[4] See note 3, *supra.*

[5] In *Dunn v. United States, supra* note 2, Mr. Justice Holmes noted that jury verdicts are sometimes the result of compromise, mistake, or levity.

> of, any control over the distillery. His participation in carrying the finished product by car does not fit the category of 'custody and possession' so nearly as it resembles the transportation of illegal liquor . . ."
> *Bozza v. United States, supra,* 330 U.S. at 163, 67 S.Ct. at *647*, 91 L.Ed. at 820.

As in *Bozza,* there was no testimony that Davis exercised any control over the distillery.

Davis makes the same contention with respect to the acquittal on the third count and, indeed, on the fourth and fifth, i.e., that the only logical explanation of the acquittal and its meaning and the matter "determined" by the jury was that he was found not to have been present at the distillery. Such an explanation of the verdict does not rule out the equally rational interpretation that the jury simply determined that Davis had not made or fermented, or caused to be made and fermented, mash.[6]

As to the acquittal on the fourth count involving unlawful possession of property, the same considerations apply that were discussed with respect to acquittal of count one. None of the evidence at the first trial indicated that Davis so much as touched any of the numerous items of property set forth in the fourth count except perhaps for his having poured some meal into an empty barrel. Nor is meal described as such in the fourth count unless under the designation "100-pound bags of shipped stuff." Possession denotes control. *Bozza v. United States, supra.* A determination that Davis did not possess the enumerated items is entirely rational.

Davis urges with vigor that no rational interpretation of acquittal on the fifth count can be made except that posited

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[6] The jury, like the author of this opinion, might have been in doubt as to whether putting meal or even malt into a barrel, empty or otherwise, would cause fermentation of mash (without proof of other steps in the process not disclosed by the evidence).

by him: that he was not the person officers observed at the illicit distillery but was elsewhere. This count charges him with having removed, deposited, and concealed 586 gallons of non-taxpaid whiskey. The only testimony showing actual physical contact of Davis with the non-taxpaid whiskey was that he picked up a foot tub of whiskey and poured it into a larger barrel.[7] In so doing, he certainly did not "conceal" it. See *Hyche v. United States,* 286 F.2d 248 (5th Cir. 1961). The word "remove" as used in this section "means more than 'transport', and has reference to removing the liquor from the place where made and where the tax thereon was supposed to be paid . . ." *Price v. United States,* 150 F.2d 283, 285 (5th Cir. 1945). Clearly Davis was not guilty of "removing" within the meaning of the statute.

This count charged the three elements (remove, deposit, conceal) in the conjunctive rather than the disjunctive. Even so, proof of any one of the prohibited acts is sufficient for conviction. *Hyche v. United States, supra.* But, since the elements were charged conjunctively, the jury could have rationally taken the United States Attorney at his word and considered all three prohibited acts together.[8] Since Davis was plainly not guilty of removing or concealing, the conjunctive language of the indictment may rationally account for acquittal of depositing. Moreover, although we think it unnecessary to decide, we are doubtful, considering the juxtapositioning of the words remove and conceal with the word deposit, that merely pouring whiskey from one container into another not intended for removal from the still

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[7] This testimony occurred in the second trial. See note 3, *supra.*

[8] The court allowed the jury to take the indictment into the jury room.

site would amount to depositing under the statute.[9] See *Hyche v. United States, supra.* Finally, it does not seem irrational to suppose that the jury may have doubted whether telescope vision was sufficient to disclose what sort of liquid was being poured. It might have been water, or mash, or beer, or, of course, whiskey.

Davis earnestly contends that the offering of substantially identical evidence at the second trial tended improperly to show him guilty of the four counts of which he had previously been acquitted. If we assume this to be true,[10] it does not necessarily follow that Davis was prejudiced. Only one well versed in the internal revenue laws would be aware of the fragmentation of a single course of conduct into multiple offenses. To offer evidence tending, although slightly, to show possession of tools and implements at the distillery in an effort to prove him guilty of working at the still does not put the accused in a worse light than one who works at a distillery without such tools. The danger presented in *United States v. Kramer,* 289 F.2d 909 (2d Cir. 1961), is not presented: a possible willingness of the second jury to convict one of conspiring with others to break and enter the United States Post Office because the jury may have believed him to have been the thief despite prior acquittal.

Finally, it is perhaps worth noting that most federal cases wherein an accused has been afforded the protection of the doctrine of collateral estoppel have involved seriatim prose-

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[9] If the tub had no stamps affixed denoting quantity of distilled spirits or evidencing payment of all internal revenue taxes imposed on such spirits — and it seems doubtful it did have — Davis would clearly have been guilty of another offense with which he was not charged. See 26 U.S.C.A. § 5604(a)(1). By analogy to what was said in *Bozza,* Davis: participation more nearly resembles unlawful possession of whiskey than removing or depositing or concealing. See *Bozza v. United States, supra,* 330 U.S. at 164, 67 S.Ct. at 647, 91 L.Ed. at 820.

[10] It has been demonstrated supra that this is, at most, only partially true. For example, the evidence fails to make out a prima facie case of removing or concealing, and is not compelling on the other counts.

cution,[11] rather than initial joinder of all offenses in one bill of indictment. Indeed, joinder of all offenses arising out of the same broad transaction (as was done here) has been thought a desirable solution, *United States v. Dockery*, 49 F. Supp. 907, 908 (E.D.N.Y. 1943), and is approved in Model Penal Code Section 1.07(2). Where there has been initial joinder of all offenses and no attempt to obtain successive bites at the cherry, the need to invoke the remedy afforded by the doctrine of collateral estoppel, if it exists at all, is certainly less compelling.

The presumption of rationality does not compel the conclusion that the jury in the initial trial determined that Davis was not identified as being present at the distillery. Its verdict can be rationally viewed as determining, in respect to the second count, disagreement on whether or not Davis was working at the distillery while allowing Davis the benefit of a reasonable doubt as to his (1) control of the still; (2) causing fermentation of the mash, (3) having possession of property used at the distillery, and (4) removing, depositing, or concealing the whiskey. We think this construction of the general verdicts of acquittal is supported by the record and by the detailed instructions of the trial judge, who carefully spelled out the varying elements in each offense specified in the bill.

Affirmed.[12]

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11 But see *Cosgrove v. United States*, 224 F.2d 146 (9th Cir. 1954), wherein subsequent prosecution of six counts of an eight-count indictment was held barred by prior acquittal of two conspiracy counts contained in it.

12 We note our displeasure with appellant's failure to comply with the requirement of Rule 10 of our rules that the charge of the district court judge be printed in the appendix. Despite the failure and resulting inconvenience to the court, in our discretion, we have not dismissed but have considered the matter on the merits.

J. SPENCER BELL, Circuit Judge, dissenting:

The appellant Davis and co-defendants were charged in a five-count indictment with operating an illicit still. All of the offenses were alleged to have taken place on the same day, and all defendants were charged in each count. The first count charged the defendants with having custody and control of the apparatus, the second with having worked at the still, the third with having made or caused to be made mash fit for distillation, the fourth with unlawful possession, and the fifth with having removed, deposited or concealed whiskey. At the first trial, the jury found Davis not guilty as to counts one, three, four and five, but failed to agree on a verdict as to count two — working at an unregistered still. A mistrial was declared as to this count, and Davis was subsequently retried, convicted and sentenced on this same count. The entire evidence of the Government against Davis at both trials[1] consisted of the testimony of five agents who observed the still in operation on the afternoon of September 1, 1964, over a period of about a half hour before raiding it. Their observations were made through a telescope located in the woods about 50 yards away. They testified that they said Davis, whom they recognized from previous acquaintance, pour malt or meal into the fermenter barrels and pour whiskey from a foot tub into a liquor barrel located under a shed at the still site.[2] He was not captured at the still, as were his co-defendants. Davis offered only alibi evidence. The burden of his defense was that he was not at the still and that the agents were mistaken in their identification of him.

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1 The brief for the Government concedes: "At the second trial the Government placed the identical witnesses used in the first trial on the stand and their testimony was substantially the same as that given by the same witnesses in the first trial." Appellee's Brief, p. 3.

2 At the first trial, Davis was seen "bending over" or "looking into" the whiskey barrel; at the second trial this became pouring whiskey into it.

I think Davis was correct in his contention that the principle of collateral estoppel operated to bar the introduction of the Government's evidence at the second trial. Collateral estoppel operates, following a final judgment, to establish conclusively a matter of fact or law for the purposes of a later lawsuit on a different cause of action between the parties to the original action in which the matter was determined. It is fully applicable in criminal cases. *Sealfon v. United States,* 332 U.S. 575, 578 (1948); *United States v. Oppenheimer,* 242 U.S. 85, 87 (1916). I do not think the jury's inability to agree on the second count in the first trial has any relevance whatsoever to the application of the doctrine at the second trial, because in its verdict on the other counts it found the real fact at issue — Davis's presence at the still — in favor of Davis. It is true, of course, that if the jury, in the first trial, instead of disagreeing, had convicted Davis on the second count while acquitting him on the others, the court could have accepted these inconsistent verdicts though they could not be rationalized. *Dunn v. United States,* 284 U.S. 390 (1932). This, however, does not justify the Government, as it now contends, in putting the defendant to a second trial on the identical evidence even for a crime different from those set forth in the four counts for which he was acquitted. This is true if that crime arises out of the same conduct and it is apparent from an examination of the entire record in the first trial that the jury, in its acquittal of Davis on the other four counts, found for him on the facts which the Government must prove in the second trial in order to convict. *Sealfon v. United States, supra.* See *Yawn v. United States,* 244 F.2d 235 (5 Cir. 1957); *United States v. Simon,* 225 F.2d 260 (3 Cir. 1955); *United States v. DeAngelo,* 138 F.2d 466 (3 Cir. 1954).

Notwithstanding the majority's meticulous analysis of the separate elements of the several crimes involved in making illicit whiskey, the one real issue before the jury was clearly

and simply a question of identification. While it is true that the testimony of the five government agents regarding what they observed at the still varied in minor particulars from the first to the second trial, the Government's entire case against Davis in both trials consisted of the agents' observations through a telescope on a single occasion. The majority opinion asserts that the jury reasonably may have been convinced of the agents' identifications of Davis since the four counts of which he was acquitted required a finding of something more than mere presence. The majority opinion fails to point out that presence alone was enough to convict the defendant on two of the four counts of which he was acquitted, and the district court carefully instructed the jury to that effect.[3] Although there is a remote possibility, of course, that the jury may have believed that Davis was present but not guilty of any of the four counts of which they acquitted him, it is highly improbable in view of the instruction as to the statutory presumptions created by presence. It is almost always possible in a criminal case to hypothesize alternative bases for a jury verdict, and to do so in the meticulous manner of the majority opinion rather than to look at the evidence as a whole is to vitiate, to a great degree, the doctrine of collateral estoppel as applied to criminal cases.

Since collateral estoppel applies only where the second case is based on a different cause of action in a civil suit or on a different criminal offense in a criminal action, the question of what facts in issue in the second trial were actually determined in the first is often a difficult one. In making its determination, the majority has applied the test generally applied in civil cases and for which the majority cites only civil authority

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[3] The court charged the jury that under the statutory presumptions of 26 U.S.C. § 5601(b)(1) and (3) (1964), they could find the defendant guilty of counts one and three if they found that he was present at the still.

(Restatement, Judgments § 68, comment K (1942), and *James, Civil Procedure* § 11.20 (1965)): "that the party seeking to foreclose reconsideration of an issue must show that it logically *must* have constituted the basis of the verdict." In my view, the very different natures of civil and criminal litigation preclude the use of the same test in determining what facts have been previously determined for purposes of collateral estoppel. In a civil action the court must be extremely cautious in making this determination because an error in favor of the party seeking application of collateral estoppel could conceivably amount to a violation of the other party's right not to be deprived of his property without due process. This factor is greatly diminished when the party against whom the doctrine is applied is not a private litigant, but the prosecution in a criminal case. In a criminal case the liberty of the defendant is at stake, not merely his rights and liabilities in a civil matter, and the predominating policy for applying collateral estoppel is the policy of the Double Jeopardy Clause of the Fifth Amendment — to prevent harassment of the defendant and his being subjected to a second trial.

It seems to me, therefore, that in a criminal case the correct test to be applied in determining what issues have been previously found for the defendant is the test used by the Second Circuit in *United States v. Kramer,* 289 F.2d 909 (2 Cir. 1961). In that case the defendant was first tried on charges of the substantive offense of burglary and acquitted. He was then charged with conspiracy to commit the same burglaries. Although the court pointed out that the elements of the crimes of conspiracy and burglary are different and therefore require different proof, it held, using the words of the Supreme Court in *Sealfon v. United States, supra,* that "the core of the prosecutor's case was in each case the same."

It seems to me beyond quibble that the "core" of the Government's case in both trials of Davis was the question

of whether Davis was present at the still and that the jury in acquitting Davis on four of the five counts in the first trial decided that issue in the defendant's favor. That trial was a full and fair hearing and a definitive adjudication of the matter. It is reason enough to apply collateral estoppel that courts must make an end to litigation but

> "More important, to permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment, 3 Holdsworth, History of English Law, 614, — and still longer before the proliferation of statutory offenses deprived it of so much of its effect. See Mr. Justice Brennan's separate opinion in Abate v. United States, 1959, 359 U.S. 187, 196, 201, 79 S. Ct. 666, 3 L.Ed. 2d 729. The very nub of collateral estoppel is to extend *res judicata* beyond those cases where the prior judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment, see United States v. Sabella, 2 Cir., 1959, 272 F.2d 206, 211, to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be." Judge Friendly writing for the court in *United States v. Kramer,* 289 F.2d 909, 916 (2 Cir. 1961). [Footnote omitted.]

I would reverse the conviction.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 877

NATHANIEL PRESLEY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment returned in the United States District Court for the Eastern District of North Carolina charged that, on September 1, 1964, petitioner and five co-defendants: (1) possessed and had under their control an unregistered distillery, in violation of 26 U.S.C. 5179; (2) worked at a distillery on which no sign was placed, in violation of 26 U.S.C. 5180; (3) made or caused to be made mash for the production of distilled spirits at an illicit distillery, in violation of 26 U.S.C. 5601(a)(7); (4) possessed specified property intended for use at an illicit distillery, in violation of 26 U.S.C. 5686(a); and (5)

243-769—67

removed, deposited and concealed non-taxpaid whiskey with intent to evade the tax imposed thereon, in violation of 26 U.S.C. 7206(4) (1 R. 8–9). At his first trial in March 1964, petitioner was acquitted on all counts except count 2, as to which the jury disagreed, resulting in a mistrial on that count (1 R. 2). Petitioner's motion to bar retrial, on grounds of former jeopardy and collateral estoppel, was denied. Upon his retrial, on count 2, petitioner was convicted and sentenced to one year's imprisonment and a $500 fine, with commitment under 18 U.S.C. 3651 for a period of six months and probation for a period of three years thereafter (1 R. 8–9, 17). The court of appeals affirmed, one judge dissenting.

The evidence, which was substantially the same as that given at the first trial, showed that investigators for the Alcohol and Tobacco Tax Unit of the Treasury Department observed petitioner by telescope, from a distance of about fifty yards, at an unregistered still in the woods of Franklin County, North Carolina. He was seen bending over a "catch tub" under the condenser, pouring whiskey from a foot tub into a barrel and pouring malt into the fermenting barrels (4 R. 4–5, 7, 27–28, 30, 40–41, 63–66).[1] A few minutes after these observations, the officers raided the still and arrested the other defendants. One man, whom they were unable to identify, escaped into the

[1] As noted in footnote 3 of the opinion below (Pet. App. 5A), the testimony that petitioner was seen pouring whiskey into a liquor barrel was not given at the first trial.

woods (4 R. 75). No sign was posted on the premises (4 R. 5–6, 31).[2]

Petitioner's acquittal on several counts of a multi-count indictment does not bar, on collateral estoppel grounds, his retrial on another count with respect to which the jury disagreed. The doctrine of collateral estoppel makes conclusive in subsequent proceedings only determinations of fact, or of mixed questions of law and fact, essential to the prior decision. *Yates* v. *United States,* 354 U.S. 298, 336; *Hoag* v. *New Jersey,* 356 U.S. 464, 470–471. Here, as held by the court below (which assumed that the doctrine applied),[3] the acquittal of petitioner on various counts

[2] All of the government evidence at the second trial was objected to on the ground of collateral estoppel (4 R. 2). Petitioner's motions to dismiss and to strike all government evidence were also denied (4 R. 82).

[3] It is arguable that the doctrine of collateral estoppel has no application to retrial after a prior jury has acquitted on some counts of a multi-count indictment and disagreed as to others. The fundamental rationale of the collateral estoppel principle is that one jury (or other finder of fact) should not be allowed to overturn the facts previously found by another jury. But when the first jury does not reach agreement on the counts to be retried, this rationale cannot be easily applied. It is clear that, if the first jury convicted on some counts and disagreed or acquitted on others, the conviction would not be set aside even if the verdict were logically inconsistent. Since the retrial on the counts as to which the first jury disagreed is, in effect, merely a continuation of the first trial, there is no more reason to require consistency of the verdict in the second trial than there is in the first. The collateral estoppel principle was, however, held to apply to retrial after disagreement as to some counts in *Cosgrove* v. *United States,* 224 F. 2d 146 (C.A. 9).

did not carry the necessary implication that petitioner was not identified as being present at the still (Pet. App. 10A). The jury could well have believed, as to counts 1 and 4, charging possession of the still and still equipment, that petitioner was present but did not have the custody or control charged. Cf. *Bozza* v. *United States,* 330 U.S. 160, 163. As to count 3, the jury similarly could well have concluded that petitioner was present but that none of the things which he was observed doing proved beyond a reasonable doubt that he made (or caused to be made) the mash found at the still. The fifth count charged that petitioner removed, deposited and concealed 586 gallons of non-taxpaid whiskey. While proof of any one of these three acts would have supported conviction (see *Crain* v. *United States,* 162 U.S. 625, 634–636; *Price* v. *United States,* 150 F. 2d 283, 285 (C.A. 5)), the charge was in the conjunctive, so that the jury could rationally have believed that a finding of all three was necessary to convict on this count (see Pet. App. 7A–9A). The observed actions of petitioner would scarcely support the charges either of concealment or of removing, and do not necessarily amount to depositing, so that acquittal on this count did not necessarily imply the jury's disbelief in his presence at the still. The observed actions showed clearly only that the person observed was working at the distillery. The first jury's inability to reach a verdict on count 2 is rationally explainable as indicating that there was no determination as to whether petitioner

was the person so observed.[4] The second jury in this case thus did not overrule the finding of the first jury but, as in any case of retrial after disagreement, reached a conclusion on a matter not previously determined. Contrary to petitioner's assertion (Pet. 10–11), the government did not prove his guilt at the second trial "by asserting facts necessarily determined against it on the first trial * * *," *United States* v. *Kramer*, 289 F. 2d 909, 916 (C.A. 2).

The decision below, which assumed that the doctrine of collateral estoppel was applicable to this case, in no way conflicts with the *Kramer* case or the other decisions cited by petitioner. Rather, it represents simply a proper application of the principles stated in those cases to the particular facts of this case.[5] There is thus no occasion for further review by this Court.

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[4] The dissent below gave weight to the trial court's instructions, pursuant to 26 U.S.C. 5601(b)(1) and (3), that presence alone at the still site would support a conviction on counts 1 and 3. However, this was only a permissible, not a necessary, inference. And the first jury's inability to agree as to count 2 indicates that at least some of those jurors rejected, rather than accepted, petitioner's testimony that he was not present at the still site. Had that count been the only one involved in the first trial, with the jury unable to agree, no question about the propriety of a retrial could conceivably be raised.

[5] Since petitioner was not acquitted on count 2 in the first trial, his double jeopardy argument (Pet. 10) is without merit (see Pet. App. 3A).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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